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In the Supreme Court

OF THE

United States

749468
Sup. Ct.

October Term, 1946

No. 813

Denny Martini and Mildred Martini, individually and doing business as Lakeside Cut-Rate Liquor Store,

Petitioners,

vs.

Paul Porter, Price Administrator, Office of Price Administration,

Respondent.

PETITION FOR WRIT OF CERTIORARI
to the United States Circuit Court of Appeals
for the Ninth Circuit
and
BRIEF IN SUPPORT THEREOF.

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In the Supreme Court
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OCTOBER TERM, 1946

No.

DENNY MARTINI and MILDRED MARTINI, individually and doing business as Lakeside Cut-Rate Liquor Store,
Petitioners,

vs.

PAUL PORTER, Price Administrator, Office of Price Administration,
Respondent.

PETITION FOR WRIT OF CERTIORARI to the United States Circuit Court of Appeals for the Ninth Circuit.

To the Honorable Fred M. Vinson, Chief Justice of the United States, and to the Honorable Associate Justices of the Supreme Court of the United States:

The petitioner, Mildred Martini, individually and as doing business as the Lakeside Cut-Rate Liquor Store, and petitioner Denny Martini, petition that a writ of

certiorari issue to review a judgment (R. 295) entered against them on July 18, 1946, by the United States Circuit Court of Appeals for the Ninth Circuit in a cause pending in that Court numbered and entitled, "No 11,082, Denny Martini and Mildred Martini, etc., Appellants, vs. Paul A. Porter, Price Administrator, Office of Price Administration, Appellee". The said judgment (R. 295) and Opinion and Dissenting Opinion (R. 277), reported in 157 Fed.2d 35, affirms a judgment (R. 17) for treble damages in the sum of $45,509 awarded respondent against petitioners by the U.S. District Court for the Northern District of California, Southern Division, on October 24, 1944, for a purported violation of a wholesale ceiling price on distilled spirits. The said Circuit Court of Appeals denied petitioners' petition for a rehearing of the cause on September 25 ~~October 26~~, 1946. (R. 296.)

SUMMARY AND SHORT STATEMENT OF THE MATTERS INVOLVED.

In November, 1943, a complaint, and on November 24, 1943, an amended complaint (R. 2) were filed in the United States District Court below by the respondent Price Administrator against the petitioners seeking treble damages for alleged sales of distilled spirits claimed therein to have "exceeded the maximum price provided by the General Maximum Price Regulation" which sum trebled "equals $238,000". The facts out of which said claim arose are as follows:

The petitioner Mildred Martini, an individual doing a licensed retail distilled spirits business under the name and style of the Lakeside Cut-Rate Liquor Store, through the negotiations of her store manager husband, the petitioner Denny Martini, purchased from Murray A. Schutz, an individual doing a general licensed wholesale distilled spirits business under the name of the Distillers Distributing Co., two carlots of imported distilled spirits called Dunbar's Canadian Whiskey.

The petitioners thereafter sold certain quantities of the distilled spirits at retail which fetched them a sum of $15,169.70 in excess of what the trial Court believed was the *wholesale* rate of $37.61 per case taxpaid to which they were entitled under the provisions of a price order fixing $37.61 per case as the wholesale rate which first was issued and admitted into evidence, over petitioners' objections, during the course of the trial below. The petitioners were authorized to sell the spirits in unlimited quantities at retail because they had acquired the "wholesale liquor dealers stamp" provided for by Section 3254 of the Internal Revenue Code. All the sales were made by petitioners at their retail stores, deliveries being made there and also by presentation of warehouse receipts at the bonded warehouse where the bulk of the spirits were stored. The sales were made between July 26, 1943, and August 31, 194~~6~~3. (R. 3.) The Price Administrator commenced a treble damage suit against them in November, 1943. The trial commenced before the trial Court, sitting without a jury, on June 13, 1944 (R. 27), and was continued from

time to time and was concluded on August 15, 1944. (R. 258.)

At the time of the sales made by the petitioners neither the Emergency Price Control Act, Sec. 205(e), nor the Price Administrator's Regulations fixed a price for the spirits in question or stated a formula by which the petitioners were to fix a price therein. Recognizing that Price Regulation No. 1499.3(c) was defective the Office of Price Administration on August 14, 1943, substituted for it Price Regulation No. 445, Sec. 5.4, 8 F.R. 11168, which provided a formula for fixing wholesale ceiling prices on whiskey. This formula was not made retroactive but was made applicable only to sales to be made after August 31, 1943. The petitioners' sales were made before that date. It had no application to the sales that had been made by the petitioners.

On June 27, 1944, during the course of the trial the Price Administrator offered in evidence (R. 234), over the objection of petitioners (R. 235), a price order (R. 240) especially made up and issued on June 24, 1944, for the purpose of supplying evidence therein. This price order fixed a wholesale ceiling price of $37.61 per case and a retail price of $50.02 per case on any and all sales of Dunbar's Canadian whiskey per specification that might be made in the *future* after August 31, 1943, by the petitioners. (R. 241.) The trial Court concluded that the petitioners ten months previous had sold at rates higher than that fixed for future sales by the price order and concluded that they were bound by the wholesale rate later set

forth in the price order and awarded the Price Administrator treble damages in the sum of $45,509.00. (R. 17.)

Thereafter, on March 10, 1945, the petitioners appealed (R. 20) from the judgment of the trial Court to the Ninth Circuit Court of Appeals which, thereafter, on July 18, 1946, affirmed the judgment, the majority opinion of that Court and the dissenting opinion of Denman, C.J. being filed on said date. (R. 277 and 292.) Petitioners' petition for a rehearing in that Circuit Court was denied on September 25, ~~October 26,~~ *1946*. (R. 296.) Your petitioners seek a review of the Circuit Court's judgment affirming the judgment of the trial Court and a reversal thereof.

STATEMENT DISCLOSING BASIS UPON WHICH IT IS CONTENDED THAT THIS COURT HAS JURISDICTION TO REVIEW THE JUDGMENT IN QUESTION.

The Supreme Court has jurisdiction to assume jurisdiction to review the decision of the Circuit Court of Appeals by writ of certiorari under the provisions of Judicial Code, Sec. 240(a), Title 28 USCA, Sec. 347(a).

The Ninth Circuit Court of Appeals had jurisdiction upon appeal to review the judgment of the District Court below under the provisions of Title 28 USCA, Sec. 225(a) (first).

The District Court below had jurisdiction over the cause under the provisions of Title 50 USCA, Sec. 925(c), and Title 28 USCA, Sec. 41(i) (a).

QUESTION PRESENTED.

The review sought herein presents the following question:

(1) Where the Price Administrator has failed to fix the ceiling price of spirits and has failed to prescribe a formula for the fixing of a price thereon may he institute and maintain any action, under Section 205(e) of the Emergency Price Control Act of 1942, Title 50 USCA, Sec. 925(e), and recover treble damages for a claimed overcharge on sales to ultimate consumers based upon a subsequent price order issued during the course of the trial which fixed maximum prices on spirits to be sold in the future but had no application to sales already made?

?

REASONS RELIED ON FOR THE ALLOWANCE OF THE WRIT AND PETITIONERS' SPECIFICATION OF ERRORS.

The petitioners rely upon the following reasons for the allowance of the writ of certiorari and specify the following as an assignment of errors, to-wit:

(1) The Circuit Court of Appeals for the Ninth Circuit has decided a federal question of national importance which heretofore has not been, but should be, settled by this Court. It has decided that the Price Administrator may first institute a suit for treble damages under a purported claim of authority of Sec. 205(e) of the Emergency Price Control Act and, thereafter, retroactively lodge authority in himself to sue and maintain such suit simply by enacting a

new price regulation and thereunder issuing a price order fixing prices on sales to be made in future but having no application to past sales. It also has decided that such a price order is entitled to controlling evidentiary weight as retroactively fixing ceiling prices on past sales. In so deciding that Court, in effect, confers capacity and authority upon the Price Administrator to sue and maintain a treble damage action which Congress has not conferred upon him. Such is prohibited by Sec. 1 of Article I of the Constitution for being a usurpation or unconstitutional delegation of legislative power. Such also is prohibited as an *ex post facto* law by Sec. 10 of Article I of the Constitution whether the treble damages awarded under Sec. 205(e) of the Emergency Price Control Act are penal or remedial in nature.

(2) The Ninth Circuit Court and the trial Court below, in holding the Price Administrator could maintain a treble damage action he had no power to commence simply by thereafter adopting a new regulation and thereunder issuing a price order fixing maximum sales prices on sales to be made in the future and in construing the same as having a retroactive price fixing power creating liability in the sellers for sales made long before the commencement of such suit and the issuance of such order, have legislated into *esse* a new rule of law and evidence violative of Sec. 1 of Article I of the Constitution.

(3) The Ninth Circuit Court has decided that Sec. 205(e) of the Emergency Price Control Act of 1942, as it read before it was amended on June 30, 1944,

was not void for being vague, indefinite and uncertain as to whom it authorized to sue for a claimed overcharge and as to what particular acts or standards of conduct would result in liability thereunder. It has also held that Sec. 205(e) of the Act was not void for containing an unconstitutional delegation of legislative power to Courts and to juries to declare who is entitled to sue thereunder and also to determine what acts thereunder may be deemed prohibited and give rise to civil liability. In so holding it upholds a delegation of legislative power which is prohibited by Sec. 1 of Article I of the Constitution. In so deciding it has decided these federal questions in a way in conflict with an applicable decision of this Court, namely, *U. S. v. Cohen Grocery Co.*, 255 U. S. 81.

(4) The Ninth Circuit Court has held that a release of one joint tort feasor jointly sued with petitioners under Sec. 205(e) of the Emergency Price Act, as it read until June 30, 1944, does not operate as a release of all joint tort feasors even though the damages awardable thereunder are remedial in nature and also that the trial Court's finding exonerating the petitioners' agent for tort does not exonerate the petitioner principals from liability for their agent's tort. In so holding it has decided a question of federal law in a way in conflict with the great weight of authority in this country.

PRAYER FOR THE ISSUANCE OF THE WRIT.

Wherefore, the petitioners pray that this Court issue its writ of certiorari directed to the United States Circuit Court of Appeals for the Ninth Circuit commanding said Court to certify and send to this Court on a day certain, to be designated therein, a full and complete transcript of the record and all proceedings in the cause numbered and entitled in said Court, "No. 11,082, Denny Martini and Mildred Martini, individually, and doing business as Lakeside Cut-Rate Liquor Store, Appellants, v. Paul A. Porter, Price Administrator, Office of Price Administration, Appellee", to the ends that said cause may be reviewed by this Court as provided by law, that said judgment of said Circuit Court of Appeals be reversed and that your petitioners have such other and further relief in the premises as may seem just.

Dated, San Francisco, California,
December 20, 1946.

WAYNE M. COLLINS,
Counsel for Petitioners.

THEODORE TAMBA,
Of Counsel.

Certificate of Counsel.

The foregoing petition for writ of certiorari, together with the hereinafter supporting brief is well founded in point of fact and law, is presented in good faith and is not interposed for delay.

Dated, San Francisco, California,
December 20, 1946.

Wayne M. Collins,
Counsel for Petitioners.

In the Supreme Court
OF THE
United States

October Term, 1946

No.

Denny Martini and Mildred Martini, individually and doing business as Lakeside Cut-Rate Liquor Store,
Petitioners,
vs.
Paul Porter, Price Administrator, Office of Price Administration,
Respondent.

BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI.

I.

JURISDICTION.

The jurisdictional statement, including the dates of entry of judgments and opinions of the District and Circuit Courts below, the citations to the pages in the record where found and where reported, the statute under which jurisdiction is invoked and statement of the grounds on which the jurisdiction of this Court

is invaded, and a statement of facts and specification of errors are contained in the petition for certiorari herein.

II.

STATUTE AND ORDER, THE APPLICATION AND VALIDITY OF WHICH ARE INVOLVED HEREIN.

Section 205(e) of the Emergency Price Control Act of 1942, Title 50 USCA, Sec. 925(e), the application and validity of which are involved herein, reads, in part, as follows:

> "If any person selling a commodity violates a regulation, order, or price schedule prescribing a maximum price or maximum prices, the person who buys such commodity for use or consumption other than in the course of trade or business may, * * * except as hereinafter provided, bring an action against the seller on account of the overcharge * * * If * * * the buyer either fails to institute an action * * * or is not entitled for any reason to bring the action, the Administrator may institute such action on behalf of the United States * * *"

The order of the Price Administrator dated June 24, 1944, establishing a wholesale and a retail price on the distilled spirits involved herein, the application and validity of which are involved herein, is set forth in the record at page 240, and also at page 282.

III.

ARGUMENT.

POINT ONE.

NO PRICE CEILING WAS VIOLATED.

The trial Court awarded treble damages to the Price Administrator on a finding that petitioners had sold spirits in violation of Sec. 205(e) of the Act. That section provides for a recovery of treble damages from a person selling a commodity "who violates a regulation order or price schedule prescribing a maximum price or maximum prices" * * * "on account of the overcharge."

For an "overcharge" to have been made there must have been a pre-existing maximum price established and the petitioners must have sold their spirits at prices in excess of that maximum price. No such maximum price had been established. The maximum price, if established at all, must be one established under Regulation 1499.3(c). As pointed out by Denman, C. J., in his dissenting opinion, R. 292, Regulation 1499.3(c) neither fixed a maximum price nor a method or formula by which the petitioners could fix a price. In consequence, no regulation was in existence by which a maximum price could be determined for the purpose of computing the "overcharge" referred to in Sec. 205(e). In short, there was neither a price ceiling fixed on the spirits in question at the time the petitioners sold the spirits nor any method or formula by which any overcharge could be computed. There was no price ceiling fixed or fixable on

the spirits. Therefore, the petitioners did not and could not violate the Act. In consequence, the judgment of the trial Court and of the Circuit Court below should be reversed.

The Office of Price Administration recognized the defect in Sec. 205(c) and on August 14, 1943, substituted for it Price Regulation No. 445, Sec. 5.4, 8 F. R. 11168, which prescribed a formula whereby the maximum wholesale price of whiskey could be calculated. This formula was not made retroactive but was made applicable only to sales to be made after August 31, 1943. All of the petitioners' sales had been made before that date.

On June 27, 1944, during the course of the trial the Price Administrator offered in evidence (R. 234), over the objection of petitioners (R. 235), a price order (R. 240) which was especially drawn up and issued on June 24, 1944, for the purpose of supplying evidence in the cause. The document was admitted into evidence. This price order purports to fix a wholesale ceiling price of $37.61 per case and a retail ceiling price of $50.02 per case on any sales of Dunbar's Canadian whiskey per specification that might be made by the petitioners in the future from and after August 31, 1943. (R. 241.) The trial Court concluded that the petitioners ten months previously had sold at rates higher than that fixed for future sales by the price order and that they were bound by the wholesale rate later set forth in the price order and awarded the Price Administrator treble damages in

the sum of \$45,509. (R. 17.) It even disregarded the retail rate.

In holding that the price order was admissible in evidence the Courts below justify its admissibility on two grounds, namely, (1) its issuance by the Price Administrator lodged authority in him to maintain the suit already commenced and (2) it was entitled to controlling evidentiary weight as retroactively fixing ceiling prices on past sales for which there was neither a ceiling price fixed nor a formula by which a ceiling price could be established. In so holding the Courts below, in effect, have sought to confer both a capacity and an authority upon the Price Administrator to maintain a treble damage action which Congress has not conferred upon him under Sec. 205(e) and which he was not authorized to commence under the Act. Such is prohibited by Section 1 of Article I of the Constitution as being a usurpation of legislative power. Such is also forbidden as an ex-post facto law by Sec. 10 of Article I of the Constitution.

POINT TWO.

THE PRICE ORDER HAS NO RETROACTIVE APPLICATION.

The Circuit Court, in affirming the judgment of the trial Court, decided that the price order which related only to sales to be made *in futuro* was admissible in evidence and had a retroactive effect of establishing a wholesale ceiling rate on spirits sold some ten months previously despite its clearly expressed pro-

visions to the contrary. In so holding the Courts below have authorized the Price Administrator to maintain a treble damage action he had no power to commence simply by thereafter adopting a new regulation and thereunder issuing a price order fixing maximum sales prices to be made in the future. They have also decided that the Price Administrator is possessed of a retroactive price fixing power creating liability in the sellers for sales made long before the commencement of the suit and before the issuance of the order. Thereby they have legislated into *esse* a new rule of law and evidence violative of Sec. 1 of Article I of the Constitution. Such legislative power has not been delegated by Congress to the Price Administrator or to the Courts. See *Field v. Clark,* 143 U. S. 649.

POINT THREE.

SECTION 205(e) OF THE ACT IS VOID FOR UNCERTAINTY AND FOR DELEGATING LEGISLATIVE POWER.

Under the provisions of Sec. 205(e) of the Act, 50 USCA, Sec. 925(e), the right to sue for treble damages for a claimed overcharge is conferred either upon the purchaser of commodities or upon the Price Administrator. The person who may sue is defined as "*the person who buys such commodity for use or consumption other than in the course of trade or business*". The Price Administrator has authority to sue only when "*The buyer is not entitled to bring suit or action under this subsection*".

The statute, Sec. 205(e), is void for being vague, indefinite, uncertain and ambiguous in the following respects: (1) it cannot be ascertained therefrom who the buyer is who may maintain a treble damage action against a seller for a claimed overcharge; (2) whether the buyer must be an ultimate consumer or may be an intermediate consumer or user of the goods sold; (3) the circumstances under which the buyer cannot sue which give rise to a cause of action in the Price Administrator.

The difficulty arises out of the meaning and significance of the phrase conferring a cause of action in a buyer who is "the person who buys such commodity for use or consumption other than in the course of trade or business". The language of the phrase is susceptible of a number of widely divergent interpretations. Entirely different constructions may be placed and have been placed by our Courts upon this phrase in an attempt to ascertain who is entitled to sue and the conditions upon which such a suit depends. It may mean that the person who buys a commodity to use or consume himself at home or elsewhere but not to resell it in the same form in his regular business is entitled to sue as an ultimate consumer. It may mean that a buyer who purchases a commodity to resell the same outside regular business channels is entitled to sue for an overcharge. It may mean almost anything or nothing. The difficulty in construction that has puzzled the Courts arises out of the fact that it cannot be determined whether the words "other

than in the course of trade or business" modify the word "buys" or the words "for use or consumption". Recognizing the infirmity in Sec. 205(e) Congress clarified it by amendment on June 30, 1944, so that it became more apparent as to when the Price Administrator was authorized to sue.

Sec. 205(e) as it read before it was amended on June 30, 1944, is void for being vague, indefinite, uncertain and ambiguous as to whom it authorized to sue for a claimed overcharge and as to what particular acts or standards of conduct would result in liability thereunder. It is also unconstitutional and void for containing an unlawful delegation of legislative power to Courts and juries to declare who is entitled to sue thereunder and also to determine what acts thereunder may be deemed forbidden and give rise to civil liability. See *U. S. v. L. Cohen Grocery Co.*, 255 U. S. 81; *Weeds v. U. S.*, 255 U. S. 109; *Tedrow v. A. T. Lewis & Son Dry Goods Co.*, 255 U. S. 98; and *Kinnane v. Detroit Creamery Co.*, 255 U. S. 102, holding unconstitutional the Lever Act of World War I.

The petitioners sold the spirits at retail to purchasers who operated bars and taverns and, in consequence, who did not resell the spirits in packaged form but converted the spirits into mixed drinks and dispensed the latter in the form of "services". Consequently, the purchasers themselves were the ultimate consumers of the packaged goods and as such they alone became entitled to maintain a suit for claimed overcharges to the exclusion of the Price Adminis-

trator under Sec. 205(e) of the Act. The Circuit Court of Appeals ~~changed~~ disregarded this contention of the petitioners. The point is novel.

POINT FOUR.

RELEASE OF JOINT TORT FEASORS RELEASED PETITIONERS.

An action for treble damages under Sec. 205(e) of the Act sounds in tort and the damages recoverable are remedial in nature and not penal. See *Bowles v. Kroger Grocery Co.* (CCA-Mo.), 141 Fed. (2d) 120; *Kerr v. Congell,* 46 N. Y. S. (2d) 932; *Bristol v. Sun Vacuum Stores,* 42 N. Y. S. (2d) 501; *Regan v. Kroger,* 54 N. E. (2d) 210. The amended complaint joined the petitioners and other codefendants as joint tort feasors. The petitioners were joined and sued as the agents of the wholesaler Schutz under the agency theory created by O.P.A. Regulation No. 445, Art. VI, Sec. 6.3a (4), which since has been superseded but which stated that every agent "shall be considered the agent of the seller and not the agent of the buyer". The amended complaint charged the petitioners jointly sold the spirits and jointly collected the purchase price. The wholesaler Schutz invoiced the goods to the purchasers to whom the petitioners sold the spirits which demonstrates they were his agents. See R. 39, 53, 79, 80, 93, 94 and 219. On June 22, 1944, during the pendency of the suit below, the codefendant Murray A. Schutz, the wholesaler, for a valuable consideration, received from the Price Administrator a covenant not to sue and a compromise and discharge

from liability and was dismissed from the suit. (R. 254.) An attempted reservation was made therein of liability upon the part of the petitioners. While it is true that a covenant not to sue one of several joint tort feasors does not release the others (*Johnson v. Pickwick,* 108 Cal. App. 279), there can be no doubt that a compromise and discharge of one joint tort feasor operates as an unconditional release of all defendants joined as co-tort feasors. *Chetwood v. California National Bank,* 113 Cal. 414, and *Hawber v. Raley,* 92 Cal. App. 701. The compromise and discharge from liability contained in that agreement released the petitioners from liability by operation of law. See *Flynn v. Manson,* 19 Cal. App. 400, holding:

> "A reservation in a release of one of several tort-feasors does not operate to hold the others, as such a provision is void for being repugnant to the legal effect and operation of the release *itself.*"

We also direct attention to the fact that the trial Court rendered its judgment (R. 18) in favor of the petitioners' agents Edward D. Hoffman and Atherton F. Read, exonerating them from liability and that the Circuit Court refused to consider that their exoneration operated as an exoneration of the petitioner principals from liability for the acts of those agents. See *Bradley v. Rosenthal,* 154 Cal. 420.

CONCLUSION.

For the foregoing reasons we submit that a writ of certiorari directed to the Ninth Circuit Court of Appeals should be granted.

Dated, San Francisco, California,
December 20, 1946.

Respectfully submitted,
WAYNE M. COLLINS,
Counsel for Petitioners.

THEODORE TAMBA,
Of Counsel.